COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss. **Department of Public Safety**
Docket No. 16-EC-0368

In Re: Saint Agnes Church
Expired Elevator Certificate: #11-L-144

DECISION

Procedural History

This matter is before the Department of Public Safety ("DPS") because Karen Laven of Delta Beckwith Elevator Co., the appellant's authorized representative, filed an appeal for administrative review, dated October 3, 2016, pursuant to 520 CMR[1] 16.03, of a civil fine imposed pursuant to Massachusetts General Law ("M.G.L.") c. 143, § 65 and 520 CMR 16.02 ("Appeal"). DPS had issued a Notice of Expired Elevator Civil Fine, dated September 12, 2016, imposing a civil fine in the total amount of $20,000 for a violation of M.G.L. c. 143, § 65.

Exhibits

The following documentation was entered into evidence:

1. Notice of Expired Elevator Civil Fine, dated September 12, 2016, re: State ID #11-L-144; and
2. October 3, 2016 letter in support of the appeal, issued (but unsigned) by Karen Laven, state testing coordinator for Delta Beckwith Elevator Co.

Findings of Fact

The following findings of fact and conclusions of law are supported by substantial evidence, based upon documents admitted into evidence, testimony, and DPS records. *M.G.L. c. 30A, § 11(2), § 14(7).*

1. Saint Agnes Church is the owner of record for the elevator with State ID #11-L-144.
2. The Certificate for Use of the elevator expired on May 31, 2013.
3. On September 12, 2016, DPS received an application for an annual inspection of elevator #11-L-144.
4. Pursuant to M.G.L. c. 143, § 65, a fine in the total amount of $20,000 was imposed for the elevator, calculated by multiplying the number of days from and including July 1,

[1] Code of Massachusetts Regulations.

2013 (the date upon which civil fines went into effect) through September 11, 2016 (i.e. >200 x $100).

Discussion

The issue is whether the owner failed to comply with applicable legal and regulatory requirements for operating elevators. M.G.L. c. 143, § 65 mandates:

> No elevator licensed under this chapter shall be operated without a valid inspection certificate. If a certificate has expired, no new certificate shall be issued until a new inspection has been completed and no elevator shall be operated until a new certificate has been issued by a qualified state inspector. The owner or operator of an elevator who fails to comply with this section shall be punished by a fine of $100 for each day that an elevator is in operation without a valid certificate. The commissioner or the commissioner's designee may waive all or a portion of the $100 per day fine and may promulgate rules and regulations establishing criteria used to determine whether the fine may be waived. For purposes of this section, an elevator shall be deemed to be in operation unless it has been placed out of service or decommissioned in accordance with procedures approved by the board. Fines shall stop accruing on the date on which the owner or operator has, in writing or in any manner prescribed by the department, requested an inspection of the elevator by the department. For any unit that has a travel distance of 25 feet or less and is located in an owner-occupied single family residence in accordance with section 64, the maximum fine shall be $5,000. For all other units, the maximum fine shall be $20,000. *M.G.L. c. 143, § 65, as amended by St. 2014, c. 165, § 167, effective July 1, 2014 (St. 2014, c. 165, § 291).*[2]

The law is currently reflected in 520 CMR 16.02 [effective August 14, 2015, amended July 1, 2016]. An inspection certificate is required pursuant to M.G.L. c. 143, § 65, 524 CMR 1.01, and 520 CMR 16.02(2). The owner must ensure compliance. *M.G.L. c. 143, § 65; 524 CMR 1.09.* The original regulation implementing civil fines for § 65 violations, 520 CMR 1.03, became effective on July 1, 2013. See *520 CMR 1.00*.

In the instant case, the $100-per-day civil fine began to accrue on July 1, 2013, given the May 31, 2013 Certificate expiration date and give the July 1, 2013 effective date of 520 CMR 1.00. DPS received the annual inspection application on September 12, 2016. Accordingly, there was evidence to support initially issuing a civil fine in the total amount of $20,000 for the subject device.

However, pursuant to 520 CMR 16.03 (effective August 14, 2015, amended July 1, 2016) a civil fine may be waived or reduced. All or part of the $100-per-day fine imposed pursuant to

[2] This language predates additional amendments effective as of July 2016.

M.G.L. c. 143, § 65 may be waived, or the fine may be affirmed, after considering the following factors: (a) the *willfulness of the violation*; (b) *previous violations*; (c) *clerical errors*, including, but not limited to, inadvertent errors on the application for annual inspection; (d) *inaccurate assessment* of the fine, based on evidence that the fine was issued in excess of or contrary to statutory authority or regulation, or based on incorrect information; (e) *lack of prior use*, including proof that the unit was not capable of being operated at the time that the fine was assessed; (f) *de minimis risk of injury to the* public, including proof that members of the public were incapable of accessing the elevator for the entire period of operation without a valid certificate; (g) *financial hardship* (described in detail in 520 CMR 16.03(6)(g)). *520 CMR 16.03(6).*

The appellant's bases for the appeal are lack of willfulness, lack of prior violations, clerical error and inaccurate assessment, as indicated in its online submission and the supporting letter. These arguments are addressed below.

Willfulness of Violation

With no evidence to the contrary, the proposition that the appellant did not act willfully in failing to timely submit its application for annual test of the subject elevator is deemed true for purposes of this decision, particularly where it submitted an application for the annual test upon realizing it was not in compliance. Such lack of willfulness warrants mitigation of the fine and shall be reflected in the order below.

It is possible that the appellant relied upon a contractor, given that its elevator service provider submitted the appeal on its behalf. However, the appellant provides no evidence such as copies of contracts with an elevator contractor, payment of fees related to inspections or other details pertaining to reliance on a third party. The appellant is advised that the Department will consider a reduction in penalties upon sufficient evidence of a service contract or other agreement showing that a third party accepted responsibility for the timely filing of annual application for elevator inspection. The Department may consider a waiver if, in addition, an owner can show the diligent pursuit of that responsibility. Any such evidence will be considered if submitted as a motion to reconsider filed within 30 days of the appellant's receipt of this decision. Alternatively, such evidence may be submitted at a hearing if appellant chooses to request a hearing pursuant to 520 CMR 16.03(3).[3]

Prior Violations

There is no evidence that the appellant has received a prior violation with respect to 520 CMR 16. In light of this fact, this is considered a first-time violation. Further reduction of the fine is warranted and shall also be reflected in the order below.

[3] The appellant may supplement or raise other defenses at the same time.

The appellant is advised that any future late-filing in violation of M.G.L. c. 143, § 65 or 520 CMR 16 shall be considered as an exacerbating factor pursuant to 520 CMR 16.03(6)(b). As such, it will offset evidence of potential mitigating factors that might warrant reduction or waiver of the late-filing penalty.

Clerical Errors

With respect to the factor of clerical error, the regulation states: Substantial evidence of a clerical error shall include, but not be limited to, inadvertent errors on the application for annual inspection. 520 CMR 16.03(6)(c).

Ms. Laven argues that she is "filing this appeal on the basis of it being a DPS system error. The DPS had the incorrect status listed for this unit in their website which led to this elevator being left off of the spreadsheet used to file for all Annuals. The status was listed as 'Word Order Issued', when it should have been 'Expired'."

This argument is too vague to establish a credible claim of clerical error in this instance. It is not clear what the asserted statuses mean or how they would have impeded the appellant (or its agent) in ensuring timely submission of the necessary application for annual inspection. It is also not clear what spreadsheet the appellant is addressing. Furthermore, the appellant provides no supporting documentation to assist in explicating its argument in this regard. Therefore, no additional mitigation is justified in this respect.

Inaccurate Assessment

Regarding inaccurate assessment, the regulation states that "[s]ubstantial evidence of an inaccurate assessment shall be limited to evidence that a fine was issued in excess of statutory authority, regulation or based on incorrect information."

As discussed above, the fine was initially accurately calculated pursuant to the mandate authorized in M.G.L. c. 143, § 65 as well as in 520 CMR 16.02.

The supporting statement also asserts that Delta Beckwith Elevator Corp. "strived to meet the Commonwealth's requirements. Despite inaccuracies in the Commonwealth's database and in the records maintained by Delta or its customers, Delta customers achieved compliance at a rate of 97% during the first year the applicable regulations were in force. Compliance has increased to 99% since Delta collaborated with its customers and worked with the State to correct inaccuracies."

The contractor's general success rate does not establish a meritorious defense in this particular instance. Rather, each device owner is obliged to be aware of the requirements related to its device. 524 CMR 1.09. This includes knowing the expiration date.

Conclusion and Order

The violation is **AFFIRMED.** However, the penalty is **REDUCED** upon a determination of lack of willfulness and lack of prior violations. The appellant is, hereby, **ORDERED** to immediately pay the **TOTAL FINE of $5,000** to the Department of Public Safety.

SO ORDERED
Department of Public Safety
By its designee,

_____

JAMES M. PLOTKIN
Hearings Officer

DATED: January 6, 2017

In accordance with 520 CMR 16.03(3), you may request a hearing in writing within 30 days of receipt of this decision if the requested relief is denied in whole or in part.[4] If a hearing is not requested, payment of any fine upheld herein is due within 30 days of the date of this decision in accordance with 520 CMR 16.03(7). If you do not request a hearing and fail to pay any fine upheld herein, the DPS may shut down the elevator pursuant to 524 CMR 8.03, 524 CMR 7.03 and 520 CMR 16.03(7).

[4] Hearing requests must be in writing, include the case docket number and should be addressed to:
Sebastian Giuliano
Civil Fine Administrator
Department of Public Safety
One Ashburton Place, Room 1301
Boston, MA 02108